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FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter of) MB Docket No. 04-191
)
San Francisco Unified School District)
)
For Renewal of License for Station KALW(FM),) Facility ID No. 58830
San Francisco, California) File No. BRED-19970801YA

To: Secretary to forward to
Richard L. Sippel, Chief Administrative Law Judge

MOTION TO ENLARGE THE ISSUES

San Francisco Unified School District ("SFUSD"), by its attorneys and pursuant to Section 1.229 of the Commission's Rules, 47 C.F.R. § 1.229, files this Motion to Enlarge the Issues and moves for the inclusion, in addition to the issues specified in the Commission's *Hearing Designation Order and Notice of Apparent Liability for Forfeiture* 1/ in the above-captioned matter, of the following issue: 2/

1/ *In The Matter of San Francisco Unified School District For Renewal of License for Station KALW(FM), San Francisco, California, Hearing Designation Order and Notice of Apparent Liability for Forfeiture*, FCC 04-114 (rel. July 16, 2004) (the "*Hearing Designation Order*").

2/ A synopsis of the *Hearing Designation Order* was published in the FEDERAL REGISTER on August 20, 2004. 69 FED. REG. 51677. Accordingly, this Motion to Enlarge the Issues is timely filed. See 47 C.F.R. § 1.229(a) (motion to enlarge issues must be filed within 15 days after publication of hearing designation order or summary thereof published in the FEDERAL REGISTER).

(1) To determine whether station KALW(FM) has provided meritorious service during the license period justifying renewal of SFUSD's license.

SFUSD respectfully submits that the meritorious service issue is relevant to the Commission's consideration of SFUSD's license renewal application for KALW(FM), San Francisco, California ("KALW" or the "Station") and would provide mitigating evidence relevant to some or all of the issues contained in the *Hearing Designation Order*.

A. Introduction

This proceeding involves SFUSD's application for renewal of its license for its noncommercial broadcast station KALW, filed on August 1, 1997. *See* FCC File No. BRED-19970801YA. On November 3, 1997, Golden Gate Public Radio ("GGPR") filed a *pro se* petition to deny SFUSD's renewal application, alleging a variety of complaints against the Station and its management. After briefing to the Commission by both sides concerning the merits of GGPR's claims and whether GGPR had properly asserted them, the Commission released the *Hearing Designation Order* in this case on July 16, 2004.

In the *Hearing Designation Order*, the Commission agreed with SFUSD that GGPR had not complied with the Commission's procedures for filing a petition to deny and that GGPR lacked standing to file its petition. *See Hearing Designation Order* at ¶ 4. Nonetheless, the Commission treated GGPR's petition as an informal objection and considered GGPR's allegations against the Station. *Id.* at ¶¶ 1, 4. While the Commission rejected many of GGPR's allegations, such as its claims concerning the Station's alleged noncompliance with Equal Employment Opportunity requirements or requirements concerning the maintenance of donor's

lists, *see id.* at ¶¶ 18-23, the Commission concluded that an evidentiary hearing was warranted on the following three issues:

1. To determine whether San Francisco Unified School District falsely certified its application with respect to completeness of the KALW(FM) public inspection file and the effect thereof on its qualifications to be a Commission licensee.
2. To determine whether San Francisco Unified School District made misrepresentations of fact or was lacking in candor and/or violated Section 73.1015 of the Commission's Rules with regard to its certification in the subject license renewal application that it had placed in the KALW(FM) public inspection file at the appropriate times the documentation required by Section 73.3527, and the effect thereof on its qualifications to be a Commission licensee.
3. To determine, in light of the evidence adduced pursuant to the specified issues, if the captioned application for renewal of license for station KALW(FM) should be granted.

Hearing Designation Order at ¶ 24.

B. Meritorious Service Issue

Both the Commission and courts have long recognized the relevance of past meritorious service in deciding whether to renew a broadcast license. The D.C. Circuit has affirmed the Commission's policy that "renewal expectancy is to be a factor weighed with all the other factors, and the better the past record, the greater the renewal expectancy 'weight.'" *Central Florida Enterprises, Inc. v. F.C.C.*, 683 F.2d 503, 506 (D.C. Cir. 1982) (emphasis deleted); *In re Application of Normandy Broadcasting Corp.*, 8 FCC Rcd 1, ¶ 66 (Sippell, A.L.J. 1992) ("*Normandy Broadcasting*").

Moreover, even when the Commission is considering also whether the licensee has violated FCC rules, the meritorious service issue is relevant to the decision of whether to renew a license. See, e.g., *In re Applications of Arkansas Educational Television Commission*, 6 FCC Rcd 478, ¶ 13 (1991) (deciding to renew license despite violations, including failure to maintain issues/programs lists, where “licensee has made substantial efforts . . . to be aware of community issues and has . . . provided issue-responsive programming in the public interest throughout the entire license period”); *Revocation of License of CS WIGO, Inc.*, 85 FCC2d 196, ¶ 50 (1981) (rejecting ALJ’s recommendation of revocation despite serious violations based, in part, on “the station’s otherwise meritorious programming”). In fact, the Commission has “frequently held that a renewal applicant should be afforded the opportunity to show meritorious programming in mitigation of adverse findings under issues relating to the past operation of its facilities.” *In re Application of Norjud Broadcasting, Inc.*, 55 FCC2d 808, ¶ 2 (Rev. Bd. 1975) (“*Norjud Broadcasting*”). And on numerous occasions, the Commission has granted licensees’ motions to enlarge the issues in order to permit consideration of past meritorious programming service. See *id.*; *Chesapeake-Portsmouth Broadcasting Corp.*, 42 FCC2d 1030, ¶ 3 (Rev. Bd. 1973) (“*Chesapeake-Portsmouth Broadcasting*”); *Oil Shale Broadcasting Co.*, 33 RR2d 1227 (1975) (“*Oil Shale Broadcasting*”); *Voice of Charlotte Broadcasting*, 58 FCC2d 991, ¶ 2 (Rev. Bd. 1976); *WWLE, Inc.*, 57 FCC2d 407, ¶ 2 (Rev. Bd. 1975); *White Mountain Broadcasting, Inc.*, 54 FCC2d 299, ¶ 2 (Rev. Bd. 1975) (“*White Mountain Broadcasting*”). SFUSD respectfully submits that the presiding Administrative Law Judge should here designate the requested issue in

order that SFUSD may submit evidence regarding its meritorious service to its community of license and service area.

The fact that one of the designated issues for consideration in this matter concerns alleged misrepresentation or lack of candor does not preclude the addition of the meritorious service issue. While the Commission has stated that “good programming itself will not be considered as a factor in mitigation of a misrepresentation,” it has also recognized that, “[i]n drawing conclusions about misrepresentation, the Commission will consider mitigating factors because the Commission has broad discretion in its choice of sanctions.” *Normandy Broadcasting*, 8 FCC Rcd at ¶¶ 53-54; *see also In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC2d 1179, ¶ 60 (1986) (“While the Commission has considered mitigating factors, if any, in drawing conclusions regarding the treatment of misrepresentation in a case, the choice of remedies and sanctions is an area in which we have broad discretion.”).

In any event, where, as here, both misrepresentation issues and other issues are set for hearing, the Commission has recognized that it is appropriate to enlarge the issues to include meritorious programming, even if the mitigating effect of that issue may be limited to those issues not involving misrepresentation. *See, e.g., Norjud Broadcasting*, 55 FCC2d at ¶ 2; *White Mountain Broadcasting*, 54 FCC2d at ¶ 2; *Oil Shale Broadcasting*, 33 RR2d 1227. Moreover, where designated issues may or may not involve misrepresentation, the appropriate course is to permit evidence of meritorious service until such time as the licensee is adjudged to have committed misrepresentation. As the Review Board has stated in the context of granting a motion to enlarge the issues in order to include meritorious programming:

The Board is cognizant of the fact that the rule violations and unauthorized transfers of control alleged in this proceeding could involve possible misrepresentation, but we concur with the Broadcast Bureau that such acts do not necessarily involve the degree of culpable conduct which renders consideration of past programming inappropriate.

WWLE, Inc., 57 FCC2d 407, ¶ 2 n. 3 (Rev. Bd. 1975) (citations omitted).

So too here, the issues designated for hearing are not limited to misrepresentation, and SFUSD consequently should be permitted to introduce evidence concerning its meritorious service to its community of license and service area. For example, such evidence could mitigate any violations concerning the maintenance of its public inspection file and/or any false—but inadvertently false—certification concerning the completeness of that file. Furthermore, evidence concerning meritorious service could inform the Commission’s exercise of discretion in crafting an appropriate sanction in the event that SFUSD is found to have committed any rule violations. *See, e.g., In re Arkansas Educational Television Comm.*, 6 FCC Rcd 478, ¶ 13 (1991).

Finally, evidence of SFUSD’s meritorious service should be permitted for the period up until this case was designated for hearing. Only at that time was SFUSD put on notice that its “license was in jeopardy.” 3/ *Norjud Broadcasting*, 55 FCC2d at ¶ 2. Particularly given that over seven years have passed since SFUSD filed its renewal application, during which time the Station has continued to provide quality programming and service to the San Francisco community, *cf. Monroe Communication Corp. v. FCC*, 900 F.2d 351, 355 (D.C. Cir. 1990)

3/ The issue of when SFUSD was on notice that its license was in jeopardy is a matter for the presiding Administrative Law Judge to decide in the first instance. *See Norjud Broadcasting*, 55 FCC2d at ¶ 2; *Chesapeake-Portsmouth Broadcasting*, 42 FCC2d at ¶ 3.

(noting that station's "most recent performance was most probative"), SFUSD should be permitted to provide evidence of its meritorious service up until the Hearing Designation Order was released on July 16, 2004.

C. Conclusion

For all of the reasons provided above, SFUSD respectfully requests that its Motion to Enlarge the Issues be granted, and that the Commission include the meritorious service issue for consideration at the evidentiary hearing set in this case.

Respectfully submitted,

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September 7, 2004

Certificate of Service

I, Regina Hogan, hereby certify that on this 7th day of September, 2004, a copy of the foregoing **Motion to Enlarge** the Issues was sent by first-class mail, postage prepaid, to:

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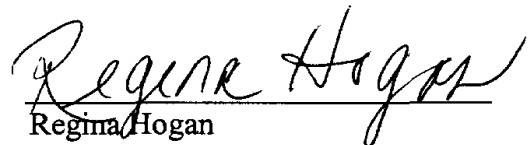
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